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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MATTIE BELINDA EVANS, Plaintiff and Appellant, v. RICKEY IVIE et al., Defendants and Respondents.	B287584 Los Angeles County Super. Ct. No. BC669497

APPEAL from a judgment of the Superior Court of Los Angeles County, Maureen Duffy-Lewis, Judge. Reversed and remanded with directions.

Mattie Belinda Evans, in pro. per., for Plaintiff and Appellant.

Thompson Coe & O'Meara, Stephen M. Caine, and Frances M. O'Meara for Defendants and Respondents.

INTRODUCTION

To prevail in an attorney malpractice action, the plaintiff must assert her claims before the one-year statute of limitations expires. But the statutory deadline may be extended—or tolled—if, among other reasons, the attorney continues to represent the plaintiff in the matter that gave rise to the claims. Plaintiff and appellant Mattie Belinda Evans asserted malpractice, breach of contract, and related causes of action stemming from the unauthorized dismissal of a cross-complaint by her attorneys, defendants and respondents Rickey Ivie, Eulanda Matthews, and Ivie McNeill & Wyatt APC (collectively, Ivie).[1] The trial court sustained Ivie's demurrer without leave to amend on timeliness grounds, and Evans appeals from the subsequent judgment of dismissal. Because the untimeliness of the lawsuit does not clearly appear on the face of Evans's complaint or matters judicially noticed, we reverse.

BACKGROUND

1. Underlying Litigation

On December 28, 2012, Evans retained Ivie to represent her as the defendant and cross-complainant in *Vearl Sneed Family Properties, Inc. et al. v. Evans*, No. BC428452 (*Sneed*). A bifurcated trial was held in September 2014 and December 2015.

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[1] Although the complaint was also filed by Evans in her capacity as "alter ego" for The Legal Connection and The Mattie B. Evans Family Trust, Evans's appellate briefs only reference Evans in her individual capacity. For purposes of this appeal, we assume the only appellant is Evans in her individual capacity. (See *Ziegler v. Nickel* (1998) 64 Cal.App.4th 545, 546 [a non-attorney trustee cannot represent the trust in propria persona].)

On December 7, 2015, Ivie dismissed Evans's cross-complaint in exchange for a waiver of court costs. On December 18, 2015, a jury returned a verdict for Evans on the remaining causes of action in the complaint. Since Evans had been absent from most of the trial due to illness, Ivie stopped by her home to tell her about the verdict. When Evans asked when proceedings on the cross-complaint would begin, Ivie told her not to worry about it and to focus on getting better.

Judgment in favor of Evans was entered on February 8, 2016, awarding her $13,632 in costs. On May 9, 2016, Evans received a copy of the judgment and learned that Ivie had dismissed her cross-complaint. On May 25, 2016, acting in pro. per., Evans filed a motion for relief from the judgment. The court denied the motion on August 11, 2016.

2. First Malpractice Lawsuit

On August 23, 2016, Evans sued her attorneys in *Evans v. Ivie et al.*, No. BC631497. The complaint alleged six causes of action stemming from the dismissal of the cross-complaint in *Sneed*: legal malpractice, intentional and negligent misrepresentation, breach of contract, breach of fiduciary duty, breach of the implied covenant of good faith and fair dealing, and negligent infliction of emotional distress.

Ivie moved to compel arbitration under a clause in the retainer agreement.[2] Evans opposed the motion, but, on April 17,

[2] Although the record does not contain the page of the agreement on which the arbitration provision appears, the court quotes it in the order granting Ivie's motion to compel. We express no opinion on whether that provision applies to claims of legal malpractice.

2017, the court ordered the parties to arbitrate. On June 5, 2017, Evans dismissed the action without prejudice.

3. Second Malpractice Lawsuit

On July 21, 2017, Evans filed a new lawsuit against Ivie, which is the suit at issue in this case. The verified complaint alleged seven causes of action stemming from the dismissal of the *Sneed* cross-complaint and the inclusion of the arbitration provision in the retainer agreement: legal malpractice, breach of contract, constructive and actual fraud and/or intentional misrepresentation, fraud in the inducement, forgery, elder financial abuse, and declaratory and injunctive relief.

On September 1, 2017, Ivie demurred to the entire complaint on the sole ground that the complaint was untimely. Ivie argued that all causes of action accrued in May 2016 and were subject to the one-year statute of limitations in Code of Civil Procedure section 340.6.[3] Because Evans did not file her complaint until July 2017, Ivie argued the complaint was time-barred.

The court sustained the demurrer without leave to amend, and Evans appealed from the resulting order. The court subsequently entered a judgment of dismissal. We construe Evans's notice of appeal as a premature appeal from the judgment of dismissal. (See Cal. Rules of Court, rule 8.104(d)(2); *Los Altos Golf & Country Club v. County of Santa Clara* (2008) 165 Cal.App.4th 198, 202–203.)

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[3] Undesignated statutory references are to the Code of Civil Procedure.

DISCUSSION

Evans contends the court erred in sustaining Ivie's demurrer without leave to amend. We agree.

1. Standard of Review

"When reviewing a judgment dismissing a complaint after the granting of a demurrer without leave to amend, courts must assume the truth of the complaint's properly pleaded or implied factual allegations. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Courts must also consider judicially noticed matters. (*Ibid.*) In addition, we give the complaint a reasonable interpretation, and read it in context. (*Ibid.*) If the trial court has sustained the demurrer, we determine whether the complaint states facts sufficient to state a cause of action. If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. (*Ibid.*) If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. (*Ibid.*) The plaintiff has the burden of proving that an amendment would cure the defect. (*Ibid.*)" (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

"Further, to prevail on a demurrer based on the statute of limitations, a defendant must establish [that] the entire cause of action is untimely. A demurrer challenges a cause of action [as a whole] and cannot be used to attack a portion of a cause of action. [Citation.] Thus, where a plaintiff sues a defendant for legal malpractice alleging several distinct acts of malpractice with respect to a single representation, a demurrer is properly granted on the basis of the statute of limitations only if *each* alleged act of

malpractice is time-barred. [Citation.]" (*Pointe San Diego Residential Community, L.P. v. Procopio, Cory, Hargreaves & Savitch, LLP* (2011) 195 Cal.App.4th 265, 274.)

"In light of these principles, the difficulties in demurring on statute of limitations grounds are clear: '(1) trial and appellate courts treat the demurrer as admitting all material facts properly pleaded and (2) resolution of the statute of limitations issue can involve questions of fact. Furthermore, when the relevant facts are not clear such that the cause of action might be, but is not necessarily, time-barred, the demurrer will be overruled. [Citation.] Thus, for a demurrer based on the statute of limitations to be sustained, the untimeliness of the lawsuit must clearly and affirmatively appear on the face of the complaint and matters judicially noticed. [Citation.]' [Citations.]" (*Austin v. Medicis* (2018) 21 Cal.App.5th 577, 585 (*Austin*).)

2. Applicable Statute of Limitations

"To determine which statute of limitations governs a given cause of action, we must first ' "identify the nature of the cause of action, i.e., the 'gravamen' of the cause of action." [Citation.] The nature of the cause of action and the primary right involved, not the form or label of the cause of action or the relief demanded, determine which statute of limitations applies. [Citations.]' [Citation.]" (*Austin*, *supra*, 21 Cal.App.5th at p. 585.) Here, Ivie contends—and Evans does not appear to contest—that all seven causes of action fall under section 340.6, subdivision (a), which establishes a one-year limitations period for claims of attorney malpractice.[4]

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[4] "Section 340.6, subdivision (a), expressly excludes causes of action based on 'actual fraud' by an attorney." (*Austin*, *supra*, 21 Cal.App.5th

3. Accrual Dates

A " 'statute of limitations does not begin to run until the cause of action accrues, that is, " 'until the party owning it is entitled to begin and prosecute an action thereon.' " [Citation.]' [Citation.] Thus, to determine when the statutes of limitations ended, we must first address when they began." (*Austin*, *supra*, 21 Cal.App.5th at pp. 587–588.)

A cause of action for attorney malpractice accrues when "the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first." (§ 340.6, subd. (a); see *Adams v. Paul* (1995) 11 Cal.4th 583, 589, fn. 2 ["discovery of the negligent act or omission initiates the [one-year] statutory period"].) Ivie contends all causes of action accrued on May 9, 2016, the date Evans learned her cross-complaint had been dismissed.

Certainly, the second, fifth, and sixth causes of action (for breach of contract, forgery, and elder financial abuse) appear to have accrued on May 9, 2016, along with parts of the first and fourth causes of action (for legal malpractice and fraud in the

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at p. 585, fn. 2.) In her third and fourth causes of action, Evans appears to allege claims of both actual fraud, which would be governed by the three-year limitations period in section 338, and constructive fraud, which would be governed by the one-year limitations period in section 340.6. (See *id.* at pp. 586–588; *Quintilliani v. Mannerino* (1998) 62 Cal.App.4th 54, 69–70.) But because, as we will discuss, the complaint does not demonstrate that any of Evans's causes of action were time-barred even under the shorter limitations period, we do not express an opinion on which statute of limitations applies to her fraud claims.

inducement). And though allegations in the third, fourth, and seventh causes of action (for actual/constructive fraud, fraud in the inducement, and declaratory and injunctive relief) and part of the first cause of action (for legal malpractice) appear to support later accrual dates,[5] we need not resolve that issue because the result would be the same even if we assume an accrual date of May 9, 2016.

4. Tolling of the Limitations Period

Although the section 340.6 limitations period begins when the plaintiff actually or constructively discovers the facts of the wrongful act or omission, the period is tolled if, among other reasons, the "attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred" (§ 340.6, subd. (a)(2)).

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[5] For example, the complaint does not reveal when Evans learned about or was injured by the retainer agreement's arbitration clause. Although Ivie disputes "the basic notion that 'discovery' of an 'unconscionable' or improper arbitration clause creates a separate cause of action," Ivie cites no authority for this assertion, and our research has not revealed any. (See, e.g., *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086–1092 [cause of action for breach of fiduciary duty]; *T&R Foods, Inc. v. Rose* (1996) 47 Cal.App.4th Supp. 1 [attorney's failure to segregate client funds was professional negligence and breach of fiduciary duty]; *Desert Outdoor Advertising v. Superior Court* (2011) 196 Cal.App.4th 866, 873 [scope of fiduciary obligation depends on facts of the case].) Ivie also posits that Evans's failure to appeal the order compelling arbitration in the first malpractice lawsuit amounts to a concession that the order was correct—yet such orders are not appealable. (§ 1294, subd. (a); *Laufman v. Hall-Mack Co.* (1963) 215 Cal.App.2d 87, 88.) In any event, Ivie did not demur on this ground below.

Under section 340.6, subdivision (a)(2), a "plaintiff who is aware of, and has been actually injured by, attorney malpractice in a matter need not file suit for malpractice while that attorney is still representing [her] on the same 'specific subject matter.' [Citations.] In deciding whether an attorney continues to represent a client, we do not focus ' "on the client's subjective beliefs" '; instead, we objectively examine ' "evidence of an ongoing *mutual* relationship and of activities in furtherance of the relationship." ' [Citations.]" (*Shaoxing City Maolong Wuzhong Down Products, Ltd. v. Keehn & Associates, APC* (2015) 238 Cal.App.4th 1031, 1038.)

Here, Ivie contends the "representation of Ms. Evans ended, by operation of law, upon entry of the judgment in *Sneed*." Ivie does not cite any authority in support of this asserted rule; instead, Ivie cites to the demurrer. The demurrer, in turn, cites several paragraphs of the complaint in which Evans explains the actions she took to try to reinstate the dismissed cross-complaint and her efforts to communicate with her attorneys about it.

But the complaint and matters judicially noticed do not reveal when the representation ended. Certainly, we can assume Ivie had stopped representing Evans sometime before August 23, 2016, when Evans sued Ivie for the first time, but the complaint and matters judicially noticed do not reveal a more specific date. For example, the docket in *Sneed*, which was attached as an exhibit to the complaint, does not indicate that Ivie ever substituted out as counsel. The docket does indicate, however, that an attorney for one of the defendants filed a notice of related cases on July 21, 2016, well after Evans filed her motion for relief from the judgment. To be sure, these snippets of information may not establish that the representation was ongoing—but they don't

need to, because the record also does not affirmatively reveal that the representation had ended.

As discussed, " 'when the relevant facts are not clear such that the cause of action might be, but is not necessarily, time-barred,' " a demurrer must be overruled. (*Austin*, *supra*, 21 Cal.App.5th at p. 585.) Because the untimeliness of the complaint filed on July 21, 2017, does not " 'clearly and affirmatively appear on the face of the complaint and matters judicially noticed,' " the court erred in sustaining the demurrer without leave to amend. (*Ibid*.)

DISPOSITION

The judgment is reversed and the order sustaining the demurrer without leave to amend is vacated. The matter is remanded with directions to enter a new order overruling the demurrer and for further proceedings consistent with the views expressed in this opinion. Mattie Belinda Evans shall recover her costs on appeal.

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LAVIN, Acting P. J.

WE CONCUR:

EGERTON, J.

DHANIDINA, J.